

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JANELL A. HADACHEK

Claimant

V.

HUTCHINSON MAYRATH

Respondent

AND

PHOENIX INSURANCE COMPANY

Insurance Carrier

Docket No. 1,072,899

ORDER

Claimant, through Mitchell W. Rice, requests review of Administrative Law Judge Rebecca Sanders' September 16, 2016 preliminary hearing Order. Brent M. Johnston appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the April 2, 2015 deposition transcript of claimant, the October 8, 2015 deposition transcripts of Alice Lohmeyer and Rick Boman, and the September 14, 2016 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant alleges injury to her right knee, right hip and low back on June 9, 2014. The judge found claimant's accidental injury did not arise out of and in the course of her employment and that is the sole issue on review. Neither party filed a brief.

FINDINGS OF FACT

Claimant, currently 50 years old, began working for respondent on August 27, 2013. After six weeks, she became a material handler in which she assembles and labels boxes on a conveyor belt about two feet off the ground. She also retrieves agricultural parts in various weights and sizes throughout the plant. She places the parts in the boxes and sends the boxes down the conveyor belt. Other than the parts, claimant is not required to lift. Claimant would load the conveyor belt with 16 boxes at a time.

Going back many years, claimant has a history of chiropractic treatment for low back and right-sided sacroiliac joint pain. Among the various records in evidence, claimant saw Tami Converse, D.C., on May 6, 2014, for complaints of low back pain radiating to her right buttock and right knee. Dr. Converse diagnosed claimant with, *inter alia*, various low back conditions, but no specific knee injury.

Claimant testified that on June 9, 2014,¹ the conveyor belt repeatedly jammed with boxes, requiring her to forcefully push back, turn and twist boxes, which in turn caused her right knee and hip to pop and start hurting. Claimant did not immediately report her injury because she thought it would get better. While she continued to work, she testified her injury worsened although she had “[g]ood days and bad days.”²

Claimant denied prior knee pain and described her prior knee complaints to Dr. Converse as different from her post-June 9 complaints. She described her prior knee symptoms as being an achy, tingling and numb sensation, perhaps due to a rotated hip, but not knee pain itself.

Claimant did not work on June 23, but saw Linda Johnston, D.C. Claimant’s chief complaint was low back pain radiating into her right sacroiliac joint which she rated as a 5 on a 0-10 pain scale. Dr. Johnston performed manipulation and indicated claimant’s prognosis was good. Claimant did not report her visit as being related to her employment. Dr. Johnston’s brief report said nothing about claimant having a knee injury. According to claimant, she was having knee problems as of June 23 and she did not have any reason not to mention her knee problems to Dr. Johnston. Claimant testified she had not yet figured out that her back and SI joint complaints were related to her work and did not see Dr. Johnston for her knee.

Rick Boman, claimant’s coworker, testified he regularly saw claimant and many mornings they walked into work together. Before June 24, he never noticed claimant having any knee problems or favoring her knee. Boman testified he walked into the plant with claimant the morning of June 24, and she was walking without difficulty.

Claimant attended a safety meeting the morning of June 24 and testified she might have told Alice Lohmeyer, her work lead, about her knee at such meeting, including that her knee was bothering her while shopping the weekend of June 21-22. Specifically, claimant indicated she remembered “telling people that we - - my leg was - - my knee was hurting and we were - - my boyfriend and I had went to Menards because he was finishing my garage.”³ Claimant testified her knee was hurting before she went shopping because she had already hurt it on June 9. Claimant testified she did not tell Lohmeyer about a work injury at the safety meeting because “we don’t discuss that stuff in the mornings. It’s just a safety meeting and we chit-chat and away we go.”⁴ Further, claimant indicated Lohmeyer was not her supervisor to whom she was to report a work injury.

¹ Unless specifically stated otherwise, all additional dates refer to 2014.

² P.H. Trans. at 14. All additional knee references concern claimant’s right knee.

³ *Id.* at 11.

⁴ *Id.* at 18.

Lohmeyer, who has worked for respondent for 39 years, has been respondent's shipping lead worker for 30 years. Lohmeyer is in charge of the boxing department. She is not claimant's supervisor, but interacts daily with claimant. She indicated claimant is a good worker and they have never had an argument or disagreement during the three years they have worked together.

On June 24, Lohmeyer noticed claimant was limping and "had a hard time walking."⁵ Lohmeyer testified she was very certain claimant told her she had injured her knee "at home, that weekend" and "had went shopping that day when it was bothering her and, by the time she got home, she could not walk on it."⁶ Lohmeyer indicated claimant told her she hurt her knee "over the weekend" and woke up on Sunday morning with a sore knee, such that claimant was having knee pain even before going shopping, but claimant never said how she hurt her knee.⁷ Lohmeyer testified:

Q. Now, you indicated that this conversation happened on June 24th, 2014?

A. Yes.

Q. Is there any particular reason that you recall that that was the date of that conversation?

A. Yeah. Because we were both gone on the 23rd. She missed work on the 23rd of June because of her knee and I was also gone that day.

Q. And why is it that you remember being gone that day?

A. Because it's my birthday. I got a year older.

Q. And how did you learn that Alice - - I'm sorry, you're Alice. How did you learn that Janell had also missed work on June 23rd?

A. She had told me on that morning of the 24th.

Q. Now, do you remember approximately at what time this conversation took place?

A. Probably 6:15. It was right after our safety huddle.

Q. And when Janell told you that she had hurt her knee, speaking to you on June 24th, did she mention to you how her knee was doing at that time?

⁵ Lohmeyer Depo. at 38.

⁶ *Id.* at 14; see also pp. 16-17, 21-22, 26, 27, 35-37.

⁷ *Id.* at 25-27.

A. She just said it was sore and it was bothering her a lot. She had went to the chiropractor, she told me, on that Monday.

. . .

Q. Did she offer any details about - - you said that she said she went shopping. Did she give you any details about that?

A. Well, she went shopping, for one thing. And then her boyfriend decided they had to walk all over all the stores in Manhattan.

Q. Prior to the conversation you had with Ms. Hadachek that day, had she ever mentioned anything to you about having any problems with her knee?

A. No.

Q. Prior to the conversation that day, did Ms. Hadachek ever limp because of her knee?

A. Never noticed it. No.⁸

Lohmeyer testified she did not know claimant was alleging a June 9 injury by accident and stated she would have noticed claimant limping before June 24 because such a condition would be obvious. Further, she stated claimant appeared fine on Friday, June 20, and had a hard time walking on June 24. Lohmeyer testified respondent's maintenance personnel investigated the conveyor belt and safety switches at claimant's workstation after she reported being injured at work.

Claimant testified that she worked a full day on June 24 and had two more boxes, including a 100-pound box, to move from one conveyor belt to another. Afterward, she noticed a change in her knee. According to claimant, she clocked out and her knee gave out as she was exiting the plant. She described her pain as "[j]ust about" unbearable.⁹

Boman saw claimant at the end of the work day on June 24. He testified she was in pain, having trouble walking and in tears. When he asked claimant what happened, she told him she "didn't know," but recalled her saying "she either turned while lifting something" or "just twisted or turned" and "something snapped."¹⁰ Boman understood that

⁸ *Id.* at 14-16; see also p. 25 ("She told me she woke up Sunday morning, they went shopping. Her knee was bothering her bad. Went shopping in Manhattan for one item, which I believe it was a door. And then her boyfriend decided that he wanted to go stomp all over the other stores in Manhattan shopping, or just to look around. . . . And by the time she got home, she could not walk.").

⁹ Claimant Depo. at 33.

¹⁰ Boman Depo. at 5-6; see also pp. 7, 10.

whatever happened to claimant, it occurred at work in the plant that day. He could not remember if claimant said anything about boxes. Boman stated he would be surprised if claimant hurt herself on June 9 because he had not seen her favor her knee until June 24. Claimant confirmed June 24 was the date Boman helped her to her car, but she further indicated she was limping beforehand, at least within a couple days after June 9.

At 4:50 p.m. on June 24, claimant returned to Dr. Johnston for a follow-up appointment. Claimant complained of a deep, aching, stiffness, sharp, burning and radiating pain involving sciatica, which she rated as a 10 on a 0-10 pain scale. Claimant did not report her visit as being related to her employment. Dr. Johnston's report did not mention claimant's knee, although claimant testified she told the chiropractor about her knee and was told she could not help. Dr. Johnston performed manipulation and indicated claimant's prognosis was good.

The following morning, June 25, claimant reported her injury to respondent. Respondent referred claimant to Christopher Worthen, M.D., for treatment. While Dr. Worthen's records are not in evidence, claimant read from his report that she pivoted at work on June 9, her knee and right hip popped and she had gradual onset of pain that worsened thereafter. When testifying, claimant denied a new accident or injury on June 24, indicating that she just continued to worsen.

When asked how she knew her symptoms developed on June 9th, claimant testified:

A. Well, it had - - my knee had not been hurting until then. And that is when - - that day it just - - it was worse that week. I had never hurt until then.

Q. Okay. And is there anything that you have as a point of reference that makes you pinpoint June 9th as the date when it started?

A. No, but I knew my leg had hurt for a couple of weeks and that is probably about when it started.

. . .

Q. So it was just kind of an estimate two weeks from June 25th?

A. Yeah, about two weeks.¹¹

¹¹ Claimant Depo. at 26-27.

On January 15, 2015, claimant saw Daniel Zimmerman, M.D., for an independent medical evaluation (IME) at her then-attorney's request. Claimant complained of knee and right hip pain. She stated she could bend her knee, but was unable to stoop, squat, crawl or kneel. Dr. Zimmerman noted claimant had chiropractic management for her right lower extremity symptoms before being seen by Dr. Worthen. Dr. Zimmerman took x-rays of claimant's knee which demonstrated medial joint space narrowing and findings consistent with a popliteal cyst. Dr. Zimmerman recommended an MRI and possible referral to an orthopedist. The doctor opined claimant's right hip symptoms were consistent with trochanteric bursitis. Dr. Zimmerman recommended anti-inflammatory medication and gave claimant restrictions against lifting more than 20 pounds occasionally and 10 pounds frequently, and to avoid frequent bending, stooping, squatting, crawling, kneeling and twisting.

In addressing prevailing factor, Dr. Zimmerman stated:

The prevailing factor for the right knee Baker's cyst and, based on examination findings when seen in this office, probable internal joint pathology within the right knee is the accident that occurred on June 9, 2014. The prevailing factor for [t]hat, based on her history, and examination appears to be trochanteric bursitis affecting the right hip, is the accident that occurred on June 9, 2014 in carrying out job duties as has been discussed in this report.¹²

On June 11, 2015, claimant saw Lowry Jones, Jr., M.D., for an IME at respondent's request. Claimant complained of constant knee pain, with increasing pain about her left knee, in addition to right hip and low back pain. Claimant reported difficulty with squatting, walking stairs, lifting or carrying activities. The doctor noted claimant's history of chiropractic treatment for lower back and bilateral hip pain. Dr. Jones assessed claimant with a possible meniscal tear and early degenerative changes in the knee, in addition to bilateral SI joint pain radiating across her hips. Dr. Jones recommended an MRI of claimant's knee. Dr. Jones stated:

It is my opinion, within a reasonable degree of medical certainty that her primary medial sided knee pain is likely associated with a meniscal tear. Her history is consistent with an acute onset of medial joint line knee pain. I believe that the injury that she described is the prevailing source of her right medial knee pain. I do not believe that the injury she described as the primary source of her lateral hip pain or her lumbar spine complaints. I believe they are chronic in nature.¹³

¹² P.H. Trans., Cl. Ex. 1 at 5.

¹³ *Id.*, Resp. Ex. A at 3.

The judge's Order stated:

Evidence establishing the Claimant's right knee [was injured] while at work is insufficient to establish that [it] in fact occurred.

Claimant's testimony is not specific as to when an injury occurred at work. Claimant then corroborates her right knee was hurt the week-end of June 22, 2014 while shopping. It is a fact Claimant testified her knee hurt before she went shopping that made her knee much worse. However it is just assumption Claimant refers to the June 9, 2014 event. Also, if Claimant hurt her knee on June 9, 2014 why did she wait two weeks to tell someone. Nobody noticed Claimant limping until June 24, 2014 the first day she returned to work after hurting her knee shopping.

It is found and concluded that Claimant's accidental injury did not arise out of and in the course of her employment.¹⁴

Claimant appealed.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h), the burden of proof is on the claimant to establish the right to an award of compensation, using a more probably true than not true standard and consideration of the whole record.

K.S.A. 2013 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

¹⁴ ALJ Order at 4.

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Appellate courts are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.¹⁵ The Board often opts to give some deference to a judge's findings and conclusions concerning credibility – although not statutorily mandated – where the judge observed the testimony in person.¹⁶

ANALYSIS

Claimant testified she was hurt on June 9 and was limping shortly thereafter. Claimant's coworkers, Boman and Lohmeyer, did not observe claimant showing signs of a knee injury until June 24. Both coworkers observed claimant limping on June 24, but at different times that day. Boman testified claimant walked into the plant that morning without any difficulty and he only saw her limping after her shift concluded. Potentially in claimant's favor, Boman understood claimant hurt herself while working on June 24, but claimant alleges she was hurt on June 9.

Differing from Boman's testimony, Lohmeyer testified she observed claimant having knee problems the morning of June 24 around 6:15 a.m. Also, Lohmeyer testified claimant appeared fine on Friday, June 20.

¹⁵ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

¹⁶ See *King v. Sealy Corp.*, No. 1,059,645, 2016 WL 858309 (Kan. WCAB Feb. 23, 2016). It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012). See also *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 836, 316 P.3d 796 (2013), *rev. denied* 301 Kan. ____ (2015).

These accounts are inconsistent, but claimant's testimony confirms she told coworkers, and possibly Lohmeyer, on June 24 that she had gone shopping the prior weekend and her knee hurt. Lohmeyer contends claimant told her she was having knee pain at some indeterminate time prior to shopping that weekend and her condition greatly worsened from walking around while shopping.

The judge had the first-hand opportunity to assess claimant's testimony. The judge apparently did not believe claimant's testimony that she was injured while performing her work on June 9. While the record is muddled, this Board Member will defer to the judge's assessment that claimant did not meet her burden of proving personal injury by accident arising out of and in the course of her employment.

CONCLUSION

Claimant did not meet her burden of proving personal injury by accident arising out of and in the course of her employment.

WHEREFORE, the Board affirms the September 16, 2016 Order.¹⁷

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Rebecca Sanders

Honorable Bruce E. Moore

¹⁷ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.